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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 248

GEORGE K. ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, LOS ANGELES, CALIFORNIA,

Petitioner,

vs.

GEORGE FLEUTI,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT

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SUBJECT INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	4
Argument	10
The Court of Appeals correctly applied the void-for-vagueness principle to the deportation proceedings in this case	10
A. The constitutional requirement of fair warning is applicable to the instant situation, since Section 212(a)(4) as applied herein acts, in substance, to impose a sanction on conduct, although on its face the statute seems to merely prescribe standards for admission of aliens	10
B. The application of the void-for-vagueness due process principle in the instant situation is not inconsistent with, but rather a reaffirmation of the assertions of this court with regard to the due process rights of lawful resident aliens	19
C. The application of Section 212(a)(4) to the instant situation would violate respondent's right to due process of law in that the term "psychopathic personality" is so vague and indefinite as to impose a sanction without fair notice of the practices to be avoided	26
Conclusion	30

TABLE OF AUTHORITIES CITED

Cases	Page
Bridges v. Wixon, 326 U. S. 135	12, 15, 22, 25
Carlisle v. United States, 16 Wall. 147	20
Claussen v. Day, 279 U. S. 398	16
Connally v. General Contr. Co., 269 U. S. 385	10, 29
Delgadillo v. Carmichael, 332 U. S. 288	15, 17
Di Pasquale v. Karnuth, 158 F. 2d 878	15, 16
Fong Haw Tan v. Phelan, 333 U. S. 6	11, 18
Gubbels v. Hoy, 261 F. 2d 952	18
Harisiades v. Shaughnessy, 342 U. S. 580	21
Johnson v. Eizentrager, 339 U. S. 763	20, 25
Jordan v. DeGeorge, 341 U. S. 223	8, 11, 16, 21
Klonis v. Davis, 13 F. 2d 630	11
Kwong Hai Chew v. Colding, 344 U. S. 590	15, 24, 27
Lanzetta v. State of New Jersey, 306 U. S. 451	10, 18, 29
Lem Moon Sing v. United States, 158 U. S. 538	19
Lutbrich v. Woodhead, 90 F. 2d 991	13
McLeod v. Peterson, 283 F. 2d 180	16
Musser v. Utah, 333 U. S. 95	18
Pincus v. Savoretti, 214 F. 2d 314	15
Shaughnessy v. United States ex rel. Mezei, 345 U. S. 206	20
The Japanese Immigrant Case, 189 U. S. 86	20, 25
United States v. Harriss, 347 U. S. 612	16, 29
United States ex rel. Volpe v. Smith, 289 U. S. 422	16
United States v. Spector, 343 U. S. 169	29
Wong Wing v. United States, 163 U. S. 228	20

PAGE

Wong Yang Sung v. McGrath, 339 U. S. 33 20

Yick Wo v. Hopkins, 118 U. S. 356 20

Yukio Chai v. Bonham, 165 F. 2d 207 15

MISCELLANEOUS

House Report No. 1365, 82nd Cong., 2d Sess. (1952), pp. 46-47, Report of the Public Health Service on the Medical Aspects of House Report No. 2379 27

New York Times (April 12, 1954), col. 2, p. 5 ..... 14, 15

Report of the President's Commission on Immigration and Naturalization (1953), p. 193, Whom Shall We Welcome? .. 19

Report of the President's Commission on Immigration and Naturalization (1953), p. 179, Whom Shall We Welcome? .. 16

STATUTES

California Penal Code, Sec. 288(a) 4

California Penal Code, Sec. 647(5) 4

Immigration and Nationality Act, Sec. 101(a)(13) 13

Immigration and Nationality Act, Sec. 112(a)(13) 3

Immigration and Nationality Act, Sec. 212(a)(b) 13

Immigration and Nationality Act, Sec. 212(a)(1) 5

Immigration and Nationality Act, Sec. 212(a)(4) 2, 7, 10, 13, 30

Immigration and Nationality Act, Sec. 212(a)(9) 5

Immigration and Nationality Act, Sec. 241(a)(1) 3, 7, 13

Immigration and Nationality Act, Sec. 265 16

Immigration and Nationality Act, Sec. 407 17

66 Statutes at Large, p. 163 13

66 Statutes at Large, p. 166 3

PAGE

66 Statutes at Large, p. 167 13
66 Statutes at Large, p. 182 ..... 2, 7
66 Statutes at Large, p. 204 ..... 3, 7
66 Statutes at Large, p. 281 17
United States Code, Title 8, Sec. 1101(a)(13) 3, 13
United States Code, Title 8, Sec. 1182(a)(b) 13
United States Code, Title 8, Sec. 1182(a)(4) 2, 7
United States Code, Title 8, Sec. 1182(a)(9) 5
United States Code, Title 8, Sec. 1251(a)(1) 3, 7
United States Code, Title 8, Sec. 1305 16
United States Code, Title 28, Sec. 1254(1) 2
United States Constitution, Fifth Amendment 7, 20

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Hoch & Zubin, Current Problems in Psychiatric Diagnosis (1953), pp. 139, 154 27
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Konitz, Civil Rights in Immigration (1953), Ch. 2 11
Konitz, Civil Rights in Immigration (1953), Ch. 2, pp. 200-203 11
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Noyes, Modern Clinical Psychiatry (3d Ed., 1941), p. 410 27

PAGE

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BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the court of appeals [R. 91-100] is reported at 302 F. 2d 652.[1] The opinion of the district court [R. 19-21] is not reported. The opinion and order of the Board of Immigration Appeals appear at R. 86-90. The opinion, findings of fact, conclusions of law, and order of the special inquiry officer of the Immigration and Naturalization Service appear at R. 79-86.

[1]The Transcript of Record which has been lodged with the Clerk of the Court by petitioner consists of a single volume of 102 pages consecutively paginated. This record shall hereinafter be referred to as "R."

Jurisdiction.

The judgment of the court of appeals was entered on April 17, 1962 [R. 101]. The petition for a writ of certiorari was filed on July 13, 1962, and was granted on October 15, 1962 [R. 102]. The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

Question Presented.

Respondent was ordered deported on the ground that he was excludable by law at the time of his re-entry as "afflicted with psychopathic personality" because he was a homosexual. The finding that he was a homosexual was based in part upon evidence of his conduct within the United States. The question presented is whether the deportation order, in these circumstances, deprived respondent of his liberty without due process because the vagueness of the term "afflicted with psychopathic personality" did not accord him fair warning of conduct to be avoided.

Statutes Involved.

Section 212(a)(4) of the Immigration and Nationality Act, 66 Stat. 182, 8 U. S. C. 1182(a)(4), provides in pertinent part:

> SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * * *
>
> (4) Aliens afflicted with psychopathic personality, epilepsy, or a mental defect;
>
> * * * * * *

Section 241(a)(1) of the same Act, 66 Stat. 204, 8 U. S. C. 1251(a)(1), provides in pertinent part:

SEC. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * * * *

Section 112(a)(13) of the same Act, 66 Stat. 166, U. S. C. 1101(a)(13), provides in pertinent part:

SEC. 112(a) As used in this chapter—

* * * * *

(13) The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary.

* * * *

Statement.

Respondent, George E. M. Fleuti, a fifty (50) year old native and citizen of Switzerland was admitted to the United States as a permanent resident on October 9, 1952. He has continuously resided here since that time except for a brief visit of a few hours to Ensenada, Mexico, sometime during the month of August, 1956 (there is no official record of such visit-respondent volunteered such information to an investigator of the Immigration and Naturalization Service [R. 74].

Respondent's training includes experience in administrative hotel work in Europe, in Los Angeles, California, and in Ojai, California, where he is presently employed. His present employers indicate that respondent's conduct and service as Front Office Manager of the Ojai Valley Inn and Country Club has, in all respects, been superior and that his honesty and integrity is exemplary [R. 45].

The charges of deportability arose out of a misdemeanor conviction in the Superior Court of the State of California in and for the County of Los Angeles for a violation of Section 288(a) of the Penal Code of California on March 9, 1956 [R. 44]; and a misdemeanor conviction in the Municipal Court, Los Angeles County, California, on August 27, 1953, for violation of Section 647(5) of the California Penal Code [R. 78].

On April 20, 1959, following a hearing before a special inquiry officer of the Immigration and Natural-

ization Service [R. 30-41], respondent was ordered deported pursuant to the provisions of Section 212(a)(1) of the Immigration and Nationality Act as an alien who, at the time of his August, 1956 re-entry, was excludable on the ground that he had been convicted of a crime involving moral turpitude (and therefore excludable at the time of re-entry under Section 212-(a)(9) of the Act, 8 U. S. C. 1182(a)(9). [R. 42]. Subsequently, a motion was made, wherein it was conceded by an examining officer of the Immigration and Naturalization Service that respondent's petty offense on August 27, 1953, did not constitute a sufficient basis for exclusion at the time of his August, 1956 re-entry, as under the applicable statutes, *supra*; the offense was not considered a crime involving moral turpitude.

By reason of the aforementioned convictions, the Service requested that the hearing be reopened for the presentation of further evidence and for further determination of deportability [R. 47-49]. The motion was granted by a special inquiry officer [R. 50] and the reopened hearings commenced on August 5, 1959 [R. 50]. At that time, an additional charge of deportability was lodged by the Service, to wit, deportability by reason of excludability at time of August, 1956 re-entry as an alien "afflicted with psychopathic personality" [R. 52-54]. This charge was based upon a medical examination requested by the Service in the interim period between the issuance of the initial deportation order and the hearing on the motion to re-

open, to wit, on June 18, 1959. A. R. Dahlgren, a senior surgeon for the United States Public Health Service gave respondent a physical examination and reviewed his history in "an hour, plus or minus" [R. 62]. He then classified respondent as a "Class A Psychopathic Personality" [R. 71], basing his evaluation on "The history and the documentation of the, shall we say, arrest" [R. 63], rather than on any information gleaned from the physical examination [R. 64]. He also drew from this the conclusion that the condition existed prior to and at the time of the August, 1956 re-entry. A sworn statement by respondent to an investigator of the Immigration and Naturalization Service taken on March 25, 1959, in Ventura, California, concerning a history of his youthful activities was submitted by the Service at this time [R. 74-75].

Respondent had been undergoing psychiatric care and treatment during this period. In defense of this new charge correspondence from the treating psychiatrist, Dr. David R. M. Harvey, was submitted at the reopened hearing. In substance it stated that respondent is not, and was not, a sexual psychopath, and that sexual drive is thought to be within his range of control. The latter further stated that "In many ways he seems to have traits of a better than average citizen, in the sense of hard work, general morality, and honesty" [R. 6-8].

On September 22, 1959, an order of deportation was issued after a hearing before the Immigration Service's special inquiry officer in Los Angeles, California, or-

dering respondent to be deported from the United States pursuant to the provisions of Section 241(a)(1) of the Immigration and Nationality Act, 8 U. S. C. 1251(a)(1), 66 Stat. 204, on the ground that respondent was subject to exclusion at the time of his 1956 re-entry for the alleged reason that he was within one or more of the classes of aliens afflicted with "psychopathic personality" under Section 212(a)(4) of the Immigration and Nationality Act, 8 U. S. C. 1182(a)(4), 66 Stat. 182 [R. 84-86].

The findings and order of deportation was appealed to the Board of Immigration Appeals and said Board dismissed respondent's appeal on November 20, 1959 [R. 86-90]. Thereafter, the present action was commenced on behalf of respondent on December 9, 1959, in the United States District Court, Southern District of California, Central Division, for declaratory and injunctive relief from deportation [R. 3-10]. The matter was heard by a single district court judge, who granted the petitioner's motion for a summary judgment on January 4, 1961 [R. 19-21].

On April 17, 1962, the Court of Appeals for the Ninth Circuit set aside the deportation and enjoined its enforcement [R. 100-101]. The appeal here was based on two contentions, namely, (1) that the deportation order was based upon inadequate evidence, and (2) that Section 212(a)(4) of the Immigration and Nationality Act violates the due process clause of the Fifth Amendment of the Constitution in that the term

"psychopathic personality" is vague, ambiguous and deprives respondent his right of liberty without fair notice of practices to be avoided. The court, however, proceeded to consider the constitutional question since it concluded, any evidentiary consideration is predicated on the validity of the applicable statute [R. 94]. The court noted that although the void for vagueness principle is generally applied with respect to criminal statutes [R. 94], yet its application has been extended to civil proceedings and particularly invoked in one instance to a statute ordering the deportation of resident alien. *Jordan v. DeGeorge*, 341 U. S. 223 (1951).

That deportation was ordered on the apparent ground that at the time of his 1956 re-entry, respondent was excludable, rather than on any act committed by respondent after such re-entry, was clearly recognized by the court. However, to arrive at its conclusion that respondent was a psychopathic personality at the time of re-entry, the Service relied upon evidence of respondent's post-entry behavior, *i.e.*, his behavior during the period after his initial 1952 and after 1956 re-entry. The record indicates that during this period respondent's homosexual proclivities were not compulsive, but a matter of choice [R. 96], therefore he could have avoided such practices if adequately forewarned.

Having determined, for the foregoing reasons, that this is a proper case for the application of the void-for-vagueness principle, the court stated that the term "psychopathic personality" must be read without refer-

ence to its legislative history; it concluded that the term when "measured by common understanding and practices" did "not convey sufficiently definite warning that homosexuality and sex perversion are embraced therein" [R. 100]. Therefore the applicable statute failed to advise him that homosexual practices conclusively evidence a "psychopathic personality" (which conclusive presumption can only be gleaned from legislative history, since medical science has questioned the use of this term). Thus, the statute failed to notify him that unless he refrained from such conduct, harsh results might follow. In substance then, the application of this statute imposes a sanction upon voluntary behavior of respondent while a lawful resident of the United States, without a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. Accordingly, the statute is void for vagueness and enforcement of the deportation order would deprive respondent of due process of law. Moreover, the court concluded, "it is a matter of speculation" whether the Service examiner might have entered a finding of "psychopathic personality" in 1959 based on "pre-entry conduct prior to October 9, 1952, or whether on such facts a charge would even have been brought. . . ." [R. 96].

ARGUMENT.

The Court of Appeals Correctly Applied the Void-for-Vagueness Principle to the Deportation Proceedings in This Case.

A. The Constitutional Requirement of Fair Warning Is Applicable to the Instant Situation, Since Section 212-(a)(4) as Applied Herein Acts, in Substance, to Impose a Sanction on Conduct, Although on Its Face the Statute Seems to Merely Prescribe Standards for Admission of Aliens.

The anti-vagueness prescription has been explained as a constitutional mandate that:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the states commands or forbids." *Lanzetta v. State of New Jersey*, 306 U. S. 451, 453 (1939).

This is only a logical correlative to the fundamental concept of justice and ordered liberty embodied in our Constitution since:

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process. . . ." *Connally v. General Contr. Co.*, 269 U.S. 385, 391 (1926).

Although this rule ordinarily applies to criminal laws where its "essential purpose is . . . to warn individuals of the criminal consequences of their conduct" it was nevertheless applied to Section 241(a)(4) of

the Imigration and Nationality Act which provided for the expulsion of an alien from the United States for the commission of two crimes involving "moral turpitude" at any time after entry; the court so applied this constitutional principle to an expulsion situation in view of the "grave nature of deportation." *Jordan v. DeGeorge*, 341 U. S. 223 at 231 (1951). Chief Justice Vinson, speaking for the court, maintained that there is only a verbal distinction between expulsion laws and criminal statutes emphasizing that although "this statute does not declare certain conduct to be criminal" the void-for-vagueness principle is applicable since "[The statute's] . . . function is to apprise aliens of the consequences which follow after conviction and sentence of the requisite two crimes." *Jordan v. DeGeorge, supra*, 230.

Moreover, the applicability of the void-for-vagueness principle to statutes involving can be seen from another perspective, to wit, its similarity to punishment for criminal behavior.

> "It is the forfeiture for misconduct of a resident in this country. Such a forfeiture is a penalty." *Fong Haw Tan v. Phelan*, 333 U. S. 6, 10 (1948).

Also see: *Klonis v. Davis*, 13 F. 2d 630 (2d Cir. 1926); Konitz, *Civil Rights in Immigration*, Ch. 2 (1953); *Whom Shall We Welcome* 200-203; Bullitt, *Deportation as a Denial of Substantive Due Process*, 28 Wash. L. Rev. 205 (1953); Note, 37 Minn. L. Rev. 440, 456-458 (1953) (grounds for deportation "read . . . like a penal code"); Comment, *Limitations on Congressional Power to Deport Resident Aliens Excludable as Psychopaths at Time of Entry*, 68 Harv. L. Rev. 931.

The affinity of this sanction to a criminal penalty and the corresponding need to impose constitutional safeguards has been further elucidated by this court in *Bridges v. Wixon*, 326 U. S. 135 (1945) where the Court, *per* Justice Douglas, expressed in part that (154):

> "Though deportation is not technically a criminal proceeding it visits a great hardship on the individual and deprives him of the rights to stay and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standard of fairness."

Again, re-emphasizing the seriousness of deportation, Justice Murphy in his concurring opinion expressed at page 163 that:

> "It is no answer that a deportation proceeding is technically non-criminal in nature and that a deportable alien is not adjudged guilty of a 'crime'. Those are over subtle niceties that shed their significance when we are concerned with safeguarding the ideals of the Bill of Rights. The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence. A deported alien may lose his family, his friends, and his livelihood forever. Returning to his native land may result in poverty, persecutions and even death. There is thus no justificable reason for discarding the democratic and humane tenets of our legal system and descending to the practices of despotism in dealing with deportation."

However, petitioner contends that the void-for-vagueness doctrine is not applicable to a statute such as Section 212(a)(4) of the Immigration and Nationality Act which purports to merely prescribe standards for admission of aliens, not proscribe and impose sanctions on their conduct while in the United States. Concededly, this is the purpose of Section 212(a)(4) when applied to an alien knocking at our gates for permission to enter. Yet, this purpose is distorted when this statute is coupled with the so-called "re-entry doctrine" which regards a return re-entry as an "entry" into the United States for immigration purposes. Section 101(a)(13) of Act, 66 Stat. 167, 8 U. S. C. 1101(a)(13). An alien requesting re-entry may thus be excludable for an act committed while a resident of the United States if he fits a category of excludability by reason of that act. The inequity of this result is further compounded carrying the re-entry doctrine over into the deportation field through Section 241(a)(1) of the same Act which permits one to be deported who "at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of entry."[2] This

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[2]A vivid illustration of this inequity is *Lurbrich v. Woodhead*, 90 F. 2d 991 (5th Cir. 1937). (Mrs. Woodhead, a lawful resident of the United States for 10 years, left this country for a two hour shopping tour to Canada. Two months later she was admitted to a hospital as a tubercular patient. Immigration authorities then brought deportation proceedings against her as an alien who, before re-entry, had tuberculosis and was likely to become a public charge. (66 Stat. 163, Section 212(a)(b), 8 U. S. C. 1182(a)(b) (1952).). The court of appeals in affirming the deportation order stated:

> "Once more we are impelled to direct attention to the toil in human anguish which so often follows that literal reading of the Immigration Act by which every departure from the United States, however, brief, and temporary, and pursuant

combination enables the Service to utilize evidence to acts committed while a lawful resident of the United States to create presumption of pre-reentry characteristics rendering him excludable at the time of re-entry;[3] in effect equating post-entry behavior with a pre-entry condition and imposing the sanction of deportation under the guise of initial excludability. This is indeed a perverted application of the doctrine and contrary to our basic concept of fair play.[4] The incongrous extremes of such a doctrine is personified in a case reported in the *New York Times*, April 12,

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to no intention to relinquish domicile, constitutes subsequent return a new entry, subjecting the unsuspecting to exclusion or deportation."

[3]This doctrine has prompted one writer to express that:

"Acceptance of the idea that power to expel is ordinarily limited to ejection based on proved or reasonably presumed pre-entry characteristics would have the merit of enabling courts to escape the paradoxical position of eloquently recognizing that *banishment is in fact punishment.*" (Emphasis ours.) Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien*, 69 Yale L. Journ. 262, 291 (1959).

[4]Speaking of the exclusion statutes, the President's Commission stated:

"The grounds for such exclusion in the immigration laws were designed to bar newcomers whose entry would be harmful to the United States. Aliens who are admitted lawfully are permitted to remain unless an offense committed in the United States renders them deportable. The Commission cannot find reasonable justification to the use of immigration laws to entrap residents of the United States who were not amenable to deportation so long as they continued to be physically in the United States, but who happened briefly to cross the international boundary lines. WHOM SHALL WE WELCOME, Rep. Pres. Commissioner on Immigration and Naturalization, pt. XV, at pages 179, 180 (1953); the courts in *Schoeps v. Carmichael*, 177 F. 2d 391 (9th Cir. 1949) inquired: No obvious answer occurs to the query of how a man can make a re-entry as an alien from a foreign country, on which he has causally set foot, into a country in which he has already been permanently domiciled for more than twenty years."

1954, p. 5, col. 2. One Samuel Jones, age 72, a Detroit Pensioner, came to this country in 1922. Shortly after his arrival, he was convicted of simple larceny and fined fifteen dollars for stealing a newspaper. He explained that he had forgotten to drop pennies into the coin box because he grabbed the paper while running to catch a streetcar. Later, Mr. Jones visited Canada for two weeks and upon returning forgot to tell immigration officials about the old conviction then in 1954, thirty years after the conviction, he faced deportation on the ground that he violated the admission laws by concealing a conviction which occurred before entry.[5] Surely, this can be

[5]Case was noted in: Hofstein, The Returning Resident, 10 Intramural L. Rev. of N. Y. U. 271.

In light of rigid and often harsh results that befall the resident alien, respondent urges that the application of the "re-entry doctrine" be re-evaluated. The doctrine enables the Immigration and Naturalization Service to expel an alien for acts or conditions which do not necessarily render him deportable or ineligible for American citizenship. *Kwong Hai Chew v. Colding*, 344 U. S. 590 (1953). If the resident alien leaves the country for a brief visit to a neighboring country then he may, with the law being applied as in the past, upon his return, be excluded or deported on grounds which would not be sufficient if he has remained at home. Does this procedure satisfy the high standards of fairness and justice which this Court has consistently applied? "Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." *Bridges v. Wixon*, 326 U. S. 135 (1945).

To the arriving alien the term "entry" means the original admission to the United States, the time when one first sees the Statue of Liberty or the Golden Gate Bridge; the time when a refugee finds a renewed hope for a better life. Scarcely would one guess that an entry after a train ride through a part of Canada, *Di Pasquale v. Karnuth*, 158 F. 2d 878 (2d Cir. 1947); an unexpected docking at a foreign port during a fishing trip, *Pincys v. Savoretti*, 214 F. 2d 314 (5th Cir. 1945); an unscheduled stop at Victoria, British Columbia, *Yukio Chui v. Bonham*, 165 F. 2d 207 (9th Cir. 1947); or when one's ship is torpedoed and one is rescued and taken to Cuba, *Delgadillo v. Carmichael*, 332 U. S. 388 (1947), would be regarded as an original entry.

nothing more than cruel and abusive punishment for a petty offense.

In the instant case, petitioner points out that on its face the statute does not purport to impose sanction or conduct. This cannot be disputed, but by carrying the re-entry doctrine over into the area of deportation in an attempt to give effect to the statute in the instant case, petitioner has ceased to use the statute as a standard for determining admissability of aliens. The court of appeals was quick to recognize this fact.

Although this Court has in some cases supported this doctrine, *Claussen v. Day*, 279 U. S. 398 (1929), *United States ex rel. Volpe v. Smith*, 289 U. S. 422 (1932), in view of the courts struggles with this concept and the stretching and pulling to avoid an unnecessarily harsh result *Di Pasquale v. Karnuth*, *supra*, *McLeod v. Peterson*, 283 F. 2d 180 (3rd Cir. 1960), we request this Court to re-evaluate the constitutionality of this doctrine which, by reason of its extraordinary usage fails to provide a lawful resident of its impact. "It is well that we should be free to rid ourselves of those who abuse our hospitality; but it is more important that the continued enjoyment of that hospitality once granted, shall not be subject to meaningless and irrational hazards." Judge Learned Hand, *Di Pasquale v. Karnuth*, *supra*. "Entry is the date and place of first admission to the United States as a permanent resident; this is the entry referred to when he fills out his yearly address report card (form I-53, Immigration and Naturalization Service) as required by the Immigration and Nationality Act, Section 265, 8 U. S. C. 1305." The present technical usage applied by the Service, however, is a far cry from "common understanding and practice" *Jordan v. De George*, 341 U. S. 223 (1951), nor do persons of common intelligence so apply the term. *United States v. Harriss*, 347 U. S. 612 (1954).

The original intent of the Service in stating the grounds for exclusion were to "bar newcomers whose entry would be harmful to the United States." *Whom Shall We Welcome*, Report of the President's Commission on Immigration and Naturalization; 1953. The Commission could not find any reasonable justification for the use of the re-entry doctrine to "entrap residents," speaking in this regard, they specifically recommended:— "The Commission recommends that the provisions directing the exclusion of aliens shall not be applicable to aliens who have established lawful permanent residence in the United States and who are returning from a brief absence." (Page 179 of the Report.) They concluded that the brief absence should not create the basis

Although the deportation order is not apparently based on respondent's records of arrests and convictions, petitioner relied on such records to conclude that respondent was a psychopathic personality at the time of the August 1956 re-entry. By carrying the re-entry doctrine over into the deportation statutes, petitioner asserts the alien presently deportable.[6] This is essentially telling respondent that he is presently deportable (or more appropriately punishable) because these convictions indicate that he is a psychopathic personality.[7] The degree of reliance on these post

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for exclusion if the resident aliens were not otherwise subject to deportation. See, also, Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 Colo. L. Rev. 309 (1956).

> "The stakes are indeed high and momentous for the alien who has acquired his residence here. We will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized. The hazards to which we are now asked to subject the alien are too irrational to square with the statutory scheme." *Delgadillo v. Carmichael, supra*, at page 391.

[6]Deportation could not possibly have been considered based on respondent's original entry on October 9, 1952, as the effective date of the statute under which deportation was ordered took effect on December 24, 1952 (Sec. 407, 66 Stat. 281). By use of the re-entry doctrine however, the entry date is said to be moved up to the date of re-entry, *i.e.*, August, 1956.

[7]One writer recognized this abusive application of the Act several years ago expressing that:

> "The McCarren Immigration Act's provision for the deportation of aliens who were excludable at time of entry as 'persons afflicted with psychopathic personality' permits administrative expulsions under an indefinite standard to which the courts have added scant precision. As a result, unpredictable and large uncontrolled deportations occur at the order of immigration hearing officers. While treating expulsion as an exercise of the generally unreviewable power of Congress over foreign relations, . . . courts acknowledge that deportation proceedings constitute governmental action within the territorial boundaries of the United States and are therefore not exempt for constitutional requirements. *Bridges v. Wixon*, 326 U. S. 135 (1945) . . . *Japanese Immigrant Case*, 189 U. S. 86 (1903) . . . *Yick Wo v. Hopkins*, 118 U. S. 356 (1886)." Comment, 68 Yale L. Journ. 931.

entry acts for the conclusion that respondent was a psychopathic personality at time of re-entry is readily ascertainable from the testimony of the doctor from the United States Public Service who so classified him. Dr. Dahlgren based his conclusions on "the history and documentation of the . . . arrest" [R. 63] and not on a physical examination of respondent [R. 64]. It is submitted, and this is the position of the Court of Appeals, that whether such a determination would have been arrived as absent evidence of post-entry behavior is purely a matter of speculation [R. 96]. Clearly then, the application of the constitutional void-for-vagueness test to this particular situation conforms to the fundamental spirit of this principle.[8]

Moreover, if any doubts remain, the federal courts have tended to construe such doubts involved in a deportation situation in favor of the alien and against deportation. *Fong Haw Tan v. Phelan*, 333 U. S. 6, 10 (1948); *Gubbels v. Hoy*, 261 F. 2d 952 (9th Cir. 1958).

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[8] *Ibid* at pp. 942-943: The vague language of the "psychopaths" clause impinges upon the due process requirement that a penal provision must forewarn potential offenders by specifically escribing what conduct will result in punishment. (*Musser v. Utah*, 333 U. S. 95, 97 (1948). "Legislature may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding . . ." *Lanzetta v. New Jersey*, 306 U. S. 451, 453 (1939). "All are entitled to be informed as to what the state commands or forbids").

"In effect, this amounted to a claim that whenever Congress found the conduct of certain classes of alien undesirable, it could equate undesirability with proof of initial excludability and therefore apply expulsion provisions unlimited in times." Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien*, 69 Yale L. Journ. 262 (1959).

B. The Application of the Void-for-Vagueness Due Process Principle in the Instant Situation Is Not Inconsistent With, But Rather, a Reaffirmation of the Assertions of This Court With Regard to the Due Process Rights of Lawful Resident Aliens.

In harmony with our basic concepts of justice and fairness, this Court was early to recognize the extension of the constitutional guarantees to lawful resident aliens. The court in *Lem Moon Sing v. United States*, 158 U. S. 538 (1895) elucidated this right *per* Justice Harlan at page 547 as follows:

> "While he [the alien] lawfully remains here he is entitled to the benefit of the guaranties of life, liberty, and property, secured by the Constitution to all persons, of whatever race, within the jurisdiction of the United States. His personal rights, when he is in this country and such of his property as is here during his absence, are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States."

To so encompass the resident alien with our Constitutional safeguards is only commensurate with the fact that we have chosen to permit him to remain indefinitely in our country and become an active and useful member of our society.[9] Neither did the en-

[9] "We have an obligation to treat such resident aliens on a level of justice close to that dispersed to citizens because, among other reasons, instead of requiring him to become naturalized if he intends to settle here, we have chosen to permit him to remain indefinitely and to become a full-fledged member of the community in which he lives: to be employed, to marry and raise a family; to pay taxes, to serve in the Armed Forces, and otherwise to participate in all activities save those reserved for citizens such as voting." WHOM SHALL WE WELCOME, Rpt. of the President's Comm'n. on Immigration and Naturalization 193 (1953). Also see Bullitt, *Deportation as a Denial of Substantive Due Process*, 28 Wash. L. Rev. 205.

lightened framers of the Constitution intend to exclude the resident aliens from this protectional purview, as the term "person" in the Fifth Amendment is sufficiently broad to include every person lawfully within United States, citizen or non-citizen. See *Yick Wo v. Hopkins,* 118 U. S. 356; *Wong Wing v. United States,* 163 U. S. 228; *Carlisle v. United States,* 16 Wall. 147.

An alien's rights may vestly differ depending on whether he is outside the United States awaiting admittance or has assimilated himself as a lawful resident into the population within our country. *The Japanese Immigrant Case,* 189 U. S. 86 (1903); *Johnson v. Eizentrager,* 339 U. S. 763 (1950); *Wong Yang Sung v. McGrath,* 339 U. S. 33 (1950); *Shaughnessy v. United States ex rel. Mezei,* 345 U. S. 206 (1953). On opposite ends of the spectrum we have the plenary power of Congress to exclude aliens altogether from entering the United States, or to prescribe the terms and conditions of their entry *vis-a-vis* the guarantee of Constitutional due process to persons residing in this country. Petitioner seems to assume in all cases involving aliens the first power is either inconsistent with or totally overrides considerations for the latter.[10] In support, cases are cited which purport

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[10]This constitutionally untenable position may be explained by the following comment:

> "The susceptibility of immigration to a classification blurred between the 'legislative' and the constitutional should not be surprising in view of the anatomy of the field; it is composed of two basic issues—political control over the borders, and constitutional due process—each of which, if taken, separately, would lead to opposite conclusions. Thus, if the claimants were not aliens and if they were claiming something other than authorization to enter or remain in this country, their case would involve simply questions of per-

to involve enforcement of statutory grounds for deportation retroactively enacted. Yet, it is noticed that Justice Jackson, the exponent for the majority in *Harisiades v. Shaughnessy*, 342 U. S. 580 (1952), the leading case cited by petitioners, strongly dissented in *Jordan v. DeGeorge*, 341 U. S. 223 (1951). In *Jordan* this Court applied the void-for-vagueness test to the term "crime involving moral turpitude" to a statute making deportability turn on post-entry conduct. The Majority found the term not unconstitutionally vague because of its deep-rooted use. The Dissent questioned whether these terms could provide a sufficiently clear standard even for courts and administrative officials. Petitioner, however, contends the dissent was only concerned with a certain type of statutory vagueness in deportation statutes, *i.e.*, uncertainty for judicial and administrative purposes. But isn't the dissents expression merely exaggerated recognition of the constitutionally infirm nature of the statute? Scarcely could the language of a criminal-type statute be fair warning to an individual if it is no help as a guide to the courts. One writer approached this problem from a different perspective:

> "As a practical matter a statute apprising the individual can be made to apprise the court and jury. It does not seem likely that a court will be unable to make a determination the individual can make. Therefore, *the important function* in the requirement of definiteness of a criminal statute

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sonal liberty and would admittedly be conducted according to constitutional standards of due process. *Ng Fung Ho v. White*, 259 U. S. 276 (1921)." Comment, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Court*, 71 Yale L. Journ. 760 (1962).

is to give notice to the individual."[11] (Emphasis added).

Furthermore, Justice Murphy in *Bridges v. Wixon*, 326 U. S. 135 (1945) [concurring opinion] undertook to clarify the constitutional status of the resident alien with respect to the power of Congress over deportation when he expounded, in part, the following (at pp. 161-162):

> "This assumption underlying the statute is that the 'plenary' power of Congress to deport resident aliens is unaffected by the guarantee of substantive freedoms contained in the Bill of Rights. In other words, as the government has urged before us, the deportation power of Congress 'is unaffected by considerations which in other contexts might justify the striking sown of legislation as an abridgment of constitutionally guaranteed rights of free speech and association'. From this premise it follows that Congress may constitutionally deport aliens for whatever reasons it may choose, limited only by the due process requirements of a fair hearing. The color of their skin, their racial background or their religious faith may conceivably be used as the basis for their banishment. An alien who merely writes or utters a statement critical of the government . . . may be subjected to the legislative whim of deportation.
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> I am unable to believe that the Constitution sanctions that assumption or the consequences that logically and inevitably flow from its application. The power to exclude and deport aliens is one

[11]Quarles, *Some Statutory Construction Problems and Approaches in Criminal Law*, 3 Vand. L. Rev. 531 at 541-542.

springing out of the inherent sovereignty of the United States. *The Chinese Exclusion* case, 130 U. S. 581, 9 S. Ct. 623. . . . Since an alien clearly brings with him no constitutional rights, Congress may exclude him in the first instance for whatever reason it sees fit. . . . But once an alien lawfully enters and resides in this country he comes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and Fifth Amendment and the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to 'all persons' and guard against any encroachment on those rights by federal or state authority. . . .

Since resident aliens have constitutional rights it follows that Congress may not ignore them in the exercise of its 'plenary' power of deportation. As this Court said in a previous exclusion case, 'But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provision of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in the 'due process of law' as understood at the time of the adoption of the Constitution. *The Japanese Immigrant Case* . . . 189 U. S. 86, 100, 23 S.Ct. 611, 614, 47 L.Ed. 721. *No less may a statute on its face disregard the basic freedoms that the Constitution guarantees to resident aliens.* The Chief Justice, in his dissenting opinion in

Jones v. Opelika, 316 U.S. 584, 609, 62 S.Ct. 1231, 1245 . . . has stated that 'the First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws'. By the same token, the First Amendment and other portions of the Bill of Rights makes no exception in favor of deportation laws or laws enacted pursuant to a 'plenary' power of the Government. . . . (Emphasis Added).

Any other conclusion would make our constitutional safeguards transitory and discriminatory in nature. . . . The alien would be fully clothed with his constitutional rights when defending himself in a court of law, but he would be stripped of those rights when deportation officials encircle him. I cannot agree that the framers of the Constitution meant to make such an empty mockery of human freedom.

Since the basic assumption of the statute is false, the Bill of Rights must be brought to bear. And when that is done several constitutional infirmities are apparent in this legislation. . . ."

In *Kwong Hai Chew v. Colding*, 344 U. S. 590 (1953) this Court was confronted with the question whether an alien who was a resident of long standing in this country, but had departed as a seaman on an American vessel was entitled to constitutional rights of due process upon re-entry. This court *per* Justice Burton repeated the fact that:

"It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person with-

in the protection of the Fifth Amendment. He may not be deprived of his life, liberty, or property without due process of law." [Cases cited: *Bridges v. Wixon*, 326 U. S. 135 (1945); *Johnson v. Eisentrager*, 339 U. S. 763 (1950); *The Japanese Immigrant Case*, 189 U. S. 86 (1903)].

The relative nature of the re-entry doctrine was then pointed out, indicating that the application of the re-entry doctrine to the returning resident by the Service does not preclude consideration of the alien's constitutional rights. In other words, the immigration purposes of the re-entry rule are not determinative of the alien's constitutional rights, rather:

> "For purposes of his constitutional right of due process, we assimilate petitioner's status to that of an alien continuously residing and physically present in the United States . . . [since] he is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien. . . ."

Similarly, even though re-entry entails the same requirements as entry for immigration purposes, it does not follow that respondent's constitutional rights to due process acquired during his period as a resident alien were "washed out" by a few hours in Mexico, as the court of appeals was quick to note [R. 97]. Accordingly, the application of the void-for-vagueness test to the instant situation corresponds with the affirmations of this court; neither is such an application inconsistent with nor abrogative of the powers of Congress to regulate immigration.

C. The Application of Section 212(a)(4), to the Instant Situation Would Violate Respondent's Right to Due Process of Law in That the Term "Psychopathic Personality" Is so Vague and Indefinite as to Impose a Sanction Without Fair Notice of the Practices to Be Avoided.

Petitioner does not seem to quarrel with the fact that the term "psychopathic personality" is vague and indefinite. Indeed, a brief recapitulation of the opinion of the Court of Appeals and the authorities cited therein clearly reveals this uncertainty:

(1) Dr. A. R. Dahlgren, the United States Public Health Service surgeon certified respondent as a "Class A psychopathic personality" because "by the instructions which I must follow, I have to place these deviates in this category. . . ." [R. 98]; he further testified: "We have to use certain terminology—and the rest of the world may not agree with this terminology: we are so ordered, therefore we do. . . ." [R. 65; 98, n. 13].

(2) Dr. David R. Harvey, respondent's attending psychiatrist, was of the opinion that respondent's deviation is not sufficient to justify the diagnosis of "psychopathic personality", but rather, the formal label should be "sexual deviation, homosexuality, now under control." [R. 98, n. 8.] The court below noted that "It is not established that Dr. Dahlgren would have differed with Dr. Harvey, if he had felt free to express his own opinion as to the term, rather than feeling obliged to apply the Public Health Service definition." [R. 99, n. 16].

(3) The Public Health Service in its report to the House of Representatives admitted that "although the term 'psychopathic personality' is vague and indefinite

no more appropriate expression can be suggested at this time (Report of the Public Health Service on the Medical Aspects of H. R. 2379 in H. R. Rep. No. 1365, 82nd Congress, 2nd Session 46-47 (1952)).

(4) The vagueness of the term is confirmed by authoritative medical experts in this field. Some of these are: Noyes, *Modern Clinical Psychiatry*, 3rd ed. 1941, 410: "psychopathic personality" . . . is considered by many to be a meaningless designation. . . . not yet is there any common agreement . . . as to classification . . . or etiology; Guttmacher, "Diagnosis and Etiology of Psychopathic Personalities as perceived in Our Time", in *Current Problems in Psychiatric Diagnosis* (Hoch & Zubin, ed. 1953), 139, 154: "At present, the diagnosis of a psychopathic personality is practically meaningless." [R. 99-100, n. 19].

These are just a few of the factors that led the Court of Appeals to state: "The conclusion is inescapable that the statutory term 'psychopathic personality', when measured by common understanding and practices, does not convey sufficiently definite warning that homosexuality and sex perversion are embraced therein". [R. 100].

Petitioner contends, however, that because the statute in question merely prescribes requisite standards for admission and because "Congress may retroactively . . . make even post-entry conduct grounds for revocation of its permission for an alien to remain in the United States," respondent is not entitled as a matter of right to any notice. Such a broad generalization disregards the implicit holding in *Kwong Hai Chew v. Colding*, 344 U. S. 590 (1953), that the Immigration Act may not arbitrarily be applied so as to convert a law-

ful permanent resident into an entering alien, and thereby take away his constitutional rights.

Moreover, petitioner subsequently seems to concede that respondent may be entitled to warning, but to something less than fair. Whatever the standard promulgated, it is asserted that looking at legislative history to give *meaning* to the statute supports an otherwise constitutionally deficient application of a deportation statute.

Now since the void-for-vagueness doctrine is designed to protect against unforeseeable imposition of sanctions, it follows that its production is properly available only to those who are capable of choosing between compliance and non-compliance. The court of appeals recognized that "Insofar as the record reveals, continuance of homosexual practices after Fleuti entered this country in 1952, and again in 1956, was not compulsive, but a matter of choice" [R. 96], therefore he should be entitled to forewarning of the serious criminal-type sanction that may be imposed by reason of his conduct while a resident of this country.

The question remains—what constitutes fair warning in this instance? It was noted by the court below that although subsequent judicial construction may make otherwise vague language sufficiently definitive; "at the time this post-entry conduct occurred, there was no decisional law as to the meaning of the term as used in this or any other federal statute." [R. 97-98; n. 12 on p. 98]. But petitioner contends that since only the rights of an alien are involved any clarification of the statute from legislative history is sufficient. This would seem contrary to prior pronouncements of this Court; neither has this Court seen fit in the past to

set up separate standards of due process. In *Lanzetta v. New Jersey*, 306 U. S. 451, 453 (1939) it was stated that:

> "If on its fact the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it . . . No one may be required, at peril of life, liberty, or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

Again, this Court in *United States v. Harriss*, 347 U. S. 612, 617 (1954), expressed:

> "Our review under the Criminal Appeals Act is limited to a decision on the alleged 'invalidity' of the statute on which the information is based. In making this decision, *we judge the statute on its face.*" (Emphasis added).

Also see: *United States v. Spector*, 343 U. S. 169, 171 (1952). The Court did, however, refer to the legislative history of the Act, but limiting its reference to ascertaining whether a reasonable construction may be made of the alleged vague language which would preserve one of the purposes of the Act. The Act, ultimately, was narrowly construed so as to avoid any "constitutional doubts".

In the instant case, although the legislative history may be of assistance to the Service in processing admission application, as applied to respondent it "forbids . . . an act in terms so vague that men of common intelligence must necessarily guess at its meaning and application . . . [therefore] it fails to meet the standards required by due process of law." *Connally v. General Construction Co.*, 269 U. S. 385, 391 (1926).

Conclusion.

Petitioner's main contention is that Section 212(a)(4) of the 1952 Immigration and Nationality Act merely prescribes standards for the admission of aliens, therefore the constitutional requirement of fair warning is not applicable. It is submitted, however, that this constitutional principle is correctly applied to the instant situation by reason of the resultant effect of the conjunctive use of various immigration acts by petitioner to render respondent deportable. Respondent is to be deported because of an alleged condition, to wit, psychopathic personality, which existed at time of the 1956 re-entry. The finding of this condition was based primarily on his post-entry or bad conduct while a resident of this country. Respondent, a lawful resident, had no fair warning that this conduct might involve such a serious penalty as deportation. It would scarcely be consonant with our concept of ordered liberty to permit such a devious application of the immigration statutes to impose a sanction in an instance where the statutory language is otherwise constitutionally void-for-vagueness.

Dated: February 27, 1963.

Respectfully submitted,

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